United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 76-7377

IN THE
United States Court of Appeals
For the Second Circuit

SAMUEL ROBINSON AND FACULTY ASSOCIATION OF ADIRONDACK COMMUNITY COLLEGE,

Plaintiffs-Appellants,

— *vs.* —

HOMER P. DEARLOVE, CHAIRMAN, MERRITT E. SCOVILLE, DURWARD D. WEAVER, JOHN GOETZ, LESLIE BRISTOL, JOHN J. CASTLE, JACQUES GRUNBLATT, J. WALTER JUCKETT, and JOSEPH RANDLES, as the Board of Trustees of Adirondack Community College,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

Table of Cases.....i

Questions Presented.....ii

Statement Of Case.....1

Argument

Point I - Plaintiff's complaint fails to state a claim upon which relief can be granted in a federal court.....6

Point II - This motion was decided pursuant to Rule 12 (b) and not pursuant to Rule 56 and no material outside of the pleadings was presented to or became a basis of the lower court's decision.....11

Point III - The hearing that was held is in full accordance with generally accepted principles of due process.....13

Point IV - The relief sought by the Plaintiffs is not cogniable under Sections 1983 and 1985 of Title 42 and is beyond the Court's jurisdiction pursuant to the 28 U.S.C. 1343.....17

Conclusion.....22

TABLE OF CASES

Page

Bishop v. Wood, U.S., 96 S.Ct. 2074 (1976).....7, 8, 9, 14

Bishop v. Wood, 377 F.Supp. 501.....7

Board of Regents v. Roth, 408 U.S. 564 (1972).....7, 8

Davis v. Johnson, 355 F.2d 129 (1966).....17

Perry v. Sindermann, 408 U.S. 593 (1972).....8

Richardson v. Pernales, 402 U.S. 389 (1971).....14

Rodes v. Municipal Authority of Milford, 409 F.2d 16, 17; cert den 396 U.S. 861, 90 S.Ct. 133, 24LEd. 2d 114; reh den 396 U.S. 950, 90 S.Ct. 377 24 L.Ed. 2d. 256.....18

Thomas v. Ward, 374 F.Supp. 206 (M.D.N.C. 1973) modified 529 F.2d 916 (4th Cir. 1976).....13

Weyandt v. Masons's Stores, Inc., 279 F.Supp 283 (1968 D.C.Pa).....18

QUESTIONS PRESENTED

1. Whether the Plaintiffs' Complaint served in this action, states any federal cause of action under Title 42 U.S.C., Sections 1983 or 1985?

2. Whether the Complaint as served, states any cause of action which the Federal Courts can acknowledge pursuant to the jurisdiction granted by Title 28 U.S.C., Section 1543?

3. When a Plaintiff is granted certain rights pursuant to a written contract and he has admittedly received all rights due pursuant to that contract, can the Federal Court 'adjudicate,' that the contract terms violate the Plaintiff's due process rights or are the Plaintiff's due process rights defined by the contract itself?

BRIEF FOR APPELLEES

S T A T E M E N T O F C A S E

The Plaintiff, Samuel Robinson was a faculty member at the Adirondack Community College for a period of time, prior to the termination of his services on August 20, 1974. At the time of termination, he was employed pursuant to an agreement between the Faculty Association of Adirondack Community College and the Board of Trustees of the College, which became effective upon required ratification on September 15, 1972.

The relevant portions of the contract are part of the Complaint before this Court, (A-5) and are set forth in the Joint Appendix beginning on page A-43. The contract terms clearly provide that the fourth contract issued by the College shall be denominated a, "continuing contract," which shall terminate either at the end of the academic year, which falls within the fiscal year in which a faculty member having such contract, reaches his sixty-fifth birthday (A-44), or for a cause, retrenchment, resignation or retirement (A-46). Further, the agreement provides that "termination for cause will be as specified in Title D of Article VIII of the Personnel Policies of the Board of Trustees" (A-46). Title C of Article VIII deals with termination for physical incapacity and says that services of any member of the staff may be terminated for such reason at "anytime," (A-48).

relevant portions of these personnel policies are set forth in the Joint Appendix beginning on page (A-47) and are made a part of the Complaint by virtue of paragraph "FIFTH" (A-5). Title D of the Personnel Policies defines what is meant by termination for cause and sets forth a procedure under which a member of the academic staff may be terminated under such definition. This definition clearly includes "inadequate performance of duties," (A-48). Title C describes termination for physical incapacity..

On August 20, 1974, Professor Robinson was notified by letter from President Eisenhardt, President of the College, that his services were being terminated as member of the faculty, as of that date. The letter further indicated that the action was taken after consultation with the Board of Trustees and further indicated that it was taken after consultation with the Plaintiff himself, with the Division Chairman and the Dean. That letter, (A-51), further indicated that pursuant to Article VIII of the Personnel Policies, Mr. Robinson would be entitled to hearing, if so requested.

That hearing was in fact held, after a postponement upon mutual agreement, on October 17, 1974 and the decision upheld. Thereafter, and on or about January 6, 1976, this action was begun. A Motion was made to dismiss the Complaint on March 18 and on or about April 5 an Amended Complaint was filed. A second Motion to Dismiss the Amended Complaint was filed and an argument on that Motion heard

before the Honorable James T. Foley, District Court of the Northern District of New York on May 3, 1976.

On June 30, Judge Foley issued a Memorandum Decision and Order granting the Motion to Dismiss and it is from this Order that the instant appeal arises, (A-32).

The transcript of the hearing held in this regard is contained in the Joint Appendix (beginning on page A-51), and clearly indicates that the Plaintiff had a full and fair hearing, that he was represented by counsel, and further clearly indicates the reasons behind the decision to terminate. Much of the hearing time was consumed by counsel for Plaintiff asking questions of the President and Dean, who both appeared at the hearing and detailed their reasons for the decision to terminate. Much of their testimony, was in fact, from personal experiences, including such facts as the personal investigations of both the President and Dean (A-54, A-56, A-61, A-63, A-69), discussions of the situation with Mr. Robinson (A-59, A-61, A-66) and evidence such as the President's talk with Mr. Robinson, when Mr. Robinson failed to show up for class and advised the President that he was not aware of what day of the week it was, (A-67), personal discussions by the President with the Plaintiff's doctor (A-69), finally leading to the President obtaining a release from the Plaintiff for his medical records and evaluating the reports of the doctor, obtained as a result of such release, indicated that Mr. Robinson

had, "brittle diabetes," a most difficult condition to regulate and have satisfactory results with and ending with the prognosis that under the most ideal conditions, his sensoria might clear up to some degree, but that such did not appear likely at the time (A-69). That letter was written on August 6, 1974 by Doctor Lattimer, the Plaintiff's personal physician. Further, even after all of this had occurred, the record indicates that a meeting was held with the President of the Faculty Association concerning the condition of the Plaintiff and an arrangement was made to have three other doctors evaluate the Plaintiff's condition (A-75). The offer was clearly made with the agreement that the College would go so far as to pay for half of the medical bill (A-75). The Association, on behalf of the Plaintiff, chose not to follow this procedure and the hearing, which had been delayed so as to accommodate the doctors' schedules, was reinstituted upon the express request of the Plaintiff Robinson and the Faculty Association, his representative with the only request made that they be given at least ten days notice to "prepare our case and subpoena the witness," (A-76). At the hearing, Doctor Eisenhart stated that it was his understanding from this letter, that the entire program of having Mr. Robinson receive new medical examinations "was out," and no objection was made, either by the Plaintiff, or his counsel to this understanding.

No indication was made and no claim was made in the Complaint

that the procedures outlined by the contract and personnel policies would not comply within the termination of this Plaintiff. The only claim made in the Complaint, was that the hearing procedures set forth in the contract and handbook deprived Plaintiff of his "due process" rights.

POINT I

PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IN A FEDERAL COURT

The sole question of law which was decided by the District Court (Foley, J) was that the Amended Complaint failed "to state a claim upon which relief can be granted," (A-33). It is important to point out that in his decision, Judge Foley specifically mentioned that he had examined the Complaint, not only liberally construing it in the Plaintiff's favor, but also taking all factual allegations as true for the purposes of adjudicating the Motion (A-34). The Plaintiff-Appellants' brief has attempted to expand the issues before that Court far beyond the realm of questions actually presented to that Court for review. Judge Foley specifically mentioned that the Complaint was based, "solely on the theory that the hearing procedure, as mandated by the Faculty Handbook, Article VIII, Titles C and D, is inadequate, both on its face and in regard to the hearing actually granted," (A-34). He pointed out that it was noteworthy that no other constitutional rights were claimed to have been violated. It is further important to note that no claim is made that the hearing procedures allowed by the contract and Faculty Handbook were not followed, but rather that the "Faculty Handbook's hearing procedure falls short of the requirements of due process mandated by the Fourteenth Amendment," (A-35).

The Appellants have attempted to argue in their brief that the Plaintiff's rights in this case are property rights, as defined by the Constitution. It has long been settled law that,

> "Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independant source such as State Law..." (Bishop v. Wood, 377 F.SUPP 501 at 504 citing Board of Regents against Roth, 92 S.Ct. 2701 at 2709).

Thus, in the instant case, it is not only relevant, but also imperative that the lower Court look to the contract and handbook terms in deciding whether or not, for the purposes of this specific action, the Plaintiff here has stated any federal claim. The single fact that the contract mentions the word continuing contract, does not, in and of itself, mean that a property right has magically appeared, but rather the Court, is required to review the entire statute (or in this case, the contract and handbook rules), to determine whether or not this Plaintiff, under the circumstances claimed in the Complaint, was deprived of something that was mandated by the contract. The expectancy creating a property right must exist by virtue of the entire understanding or statute and not simply by virtue of one word.

It is for this reason that the Court considered the holding in Bishop v. Wood U.S., 96 S.Ct. 2074 (1976) as clarifying the role of federal courts in reviewing state personnel decisions where deprivation of rights of liberty and property under the due process clause

were alleged. In the Bishop case, where the lower Court had found that the Plaintiff therein was granted all of the rights which could fairly be expected under State law, the Court held that the Fourteenth Amendment imposed no further requirements insuring his interests. Similarily, the Court in this case said that since this Plaintiff does not claim that he was deprived of some right guaranteed by state law, regulation or rule, or provision of the handbook, he was not deprived of any property rights.

In their brief, the Appellant seeks to distinguish the Bishop case from the instant case, by attempting to deny that the Bishop case somewhat restricts the perimeters of the Roth (cited supra) and Sindermann (408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed., 2nd 570, cases). It cannot be denied, from reading the dissent of Justice Brennan in the Bishop case, that Judge Foley was correct in stating that the Bishop case clearly indicates an intention on the part of the Supreme Court that states, are fully competant to enact procedures for the withdrawal, as well as the granting of job rights and that federal courts are not mandated to review every decision terminating employment or the procedures by which such personnel decisions are made. The Roth and Sindermann cases, which have generally stood for the proposition that in some cases, so called "job rights," rise to the level of property rights protected by the Fourteenth Amendment in some cases. However, these cases are generally grounded in the theory

that some other federal rights, namely free speech, freedom of religion, etc., are involved. Bishop is a decision by the Supreme Court that in cases where the expectancy of the "job right" is defined by state law, and where the public employer was not "motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rithts," (Bishop at 2079), the federal courts will not intervene, considering these cases to be matters of personnel policy rather than constitutionally protected rights and has stated that, "the due process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."

In the instant case, realizing that the thrust of the whole action is an attack on the personnel policies themselves, and not strictly speaking, on the manner in which the instant Plaintiff was handled, this result appears to be more equitable even than the Bishop result. In this case, the policies were set forth in writing and were a part of a contract freely negotiated between the Union representing the Plaintiff and the Board of Trustees. If the Court were to intervene in this case, it would in effect, be rewriting a contract freely entered into between two parties and this is clearly not within the realm of anticipated action under the Fourteenth Amendment. Calling this contract "continuing" in itself, does not create a property and more than simply calling Mr. Bishop a "per-

manent" employer. It is the total definition contained in the underlying statute, rule, ordinance or contract. Here Mr. Robinson should have clearly expected his contract to terminate either when he became sixty-five, physically incapacitated or inadequately performed his duties.

Given this interpretation, it is submitted that the Decision of the District Court was indeed correct, and that it should therefore be affirmed.

POINT II

THIS MOTION WAS DECIDED PURSUANT TO RULE 12 (b) AND NOT PURSUANT TO RULE 56 AND NO MATERIAL OUTSIDE OF THE PLEADINGS WAS PRESENTED TO OR BECAME A BASIS OF THE LOWER COURT'S DECISION

In an obvious attempt to sidestep the basis issues, Appellants have attempted to argue to this Court that because the minutes of the hearing held on October 17 were annexed to the Motion papers, it must be said that the lower Court considered matters outside of the pleading presented, and thereore, decided the Motion under Rule 56 and not under Rule 12 (b).

This argument lacks force for two specific reasons. Primarily, the Court is referred to paragraph "Twelfth" (A-7) of the Plaintiff's Complaint which begins, "as appears from the typed minutes of the hearing conducted on October 17, 1974..." Furthermore, in paragraphs "Twelfth" and "Thirteenth," of the Complaint, the Plaintiffs have gone on to characterize and draw conclusions from exactly what was said at the hearing. It is submitted that none of the legal characterizations of conclusions made in these paragraphs of the Complaint are subject to any special presumption, even on a Motion to Dismiss, since they do not state matters of fact, but are rather the Plaintiffs' characterizations of the hearing itself. It is submitted, that by describing the minutes themselves in the Complaint, the Plaintiffs have, in fact, made them a part of the Complaint itself. It is difficult to imagine how the Plaintiffs can at one hand contend that the hearing procedure was erroneous, without submitting to the

Court, the minutes of the very hearing which they have called into question. It would appear that their failure to supply the Court with the minutes would render their Complaint almost fatally defective.

However, and more over, it is clear from the lower Court's decision that the hearing minutes were not an intrical part of its decision with reference to the Complaint. Judge Foley indicated that the transcript did in fact indicate that he considered the transcript for the Plaintiff's benefit to assure that, "all possible claims Plaintiff might have raised in the pleadings are evaluated," even though they were not in fact raised by the Plaintiff himself, (A-38). This would indicate that the minutes were used in an attempt to determine whether or not some other claim which may have been stated, but which was not stated, could have been stated.

Since the only issue before the Court was whether or not any federal claim was stated based on the theory that the Faculty Handbook procedures were not in accordance with generally accepted due process requirements, the question of the consideration of the minutes and the whole argument related to Rule 56 becomes irrelevant, an additional reason why the Order of the lower Court should be affirmed.

POINT III

THE HEARING THAT WAS HELD IS IN FULL ACCORDANCE WITH GENERALLY ACCEPTED PRINCIPLES OF DUE PROCESS

Assuming, for purposes of argument only, that the Federal Court had a right to go beyond the terms of the contract itself and to graft additional requirements on to those freely negotiated between the parties, it is apparent from the transcript of the hearing, which was indeed and in fact held, that considering the academic setting, and the reasons for the plaintiff's termination, the hearing which was indeed held is well within the framework of those cases concerning due process rights of teachers.

The case of Thomas v. Ward, 37 F. Supp. 206 (M.D.N.C. 1973) was cited in the Appellants' brief concerning a teacher in North Carolina who felt that his constitutional right to due process had been violated. Appellant's claim that the holding in Thomas is that once the School Board had decided to allow a hearing, the hearing must be conducted within the generally accepted framework of due process. Certain statements were made by that Court as to what due process includes.

Primarily, we contend that when the Court eventually sustained the Board's decision, it did so by reviewing the transcript as could be said of the lower Court here. The Courts clearly have the proper authority to review these transcripts. It is true that upon review-

ing the first hearing transcript in Thomas, the Court stated that since the general issue before the Board was the general quality of the teachers qualifications, which is a somewhat subjective standard and since specific questions were raised about the reliability of specific evidence presented, the Court felt a clearer statement could have been offered.

Many things however, differentiate Thomas from Robinson. Firstly, Thomas was decided before Bishop and it must be considered unlikely that such a result would occur today. While Federal rights must clearly be protected, Bishop would indicate that general personnel questions are not reviewable by a Federal Court. Moreover, the Thomas Court was dealing in the abstract, there was no previously agreed upon hearing procedure. Thomas was not represented by counsel, the type of affidavit evidence presented in the Thomas case was affidavits of students whose credability was questionable. The reports presented in Robinson were of the Plaintiff's own doctor, specifically admissable under Richardson v. Pernales (402 U.S. 389, 1971) Mr. Robinson was represented by counsel of his own choice (A-52). The transcript itself will show that no specific objections were made by the Plaintiff's counsel throughout the hearing as to any of the procedures employed therein and in fact, when specifically asked, Plaintiff's representatives stated, "I have nothing further to go over at this time...." (A-77). At the hearing, President Eisenhardt

stood willing to receive other medical information or to enter into the agreement, to have the Plaintiff reevaluated by a team of three physicians, which had been rejected by the Plaintiff on the theory that the agreement would not be accepted unless Professor Robinson's pay status were to continue. It was pointed out at the hearing that the pay status would in fact continue (A-76). Also, the letter from Bruce McDonald, the Union Representative, sent on the Plaintiff's behalf to the Board, indicated that he had discussed this matter with the Plaintiff and it was their determination that the Board should hold the hearing, the only request being that they be given at least ten days advance notice to prepare our case and subpoena witnesses, (A-76). The existence of this arrangement would belie the Plaintiff's position that he did not know what the hearing was all about or that he did not have time to prepare his case properly. It is also important to note that the hearing reflects that no witnesses at all on Plaintiff's behalf, other than the Plaintiff himself, appeared at the hearing and that in fact, it was the Plaintiff who chose not to present further medical evidence, obviously indicating that he was aware of the evidence already existing.

These are just some of the specific points mentioned in the transcript, but it is clear that a reading of the entire transcript would indicate that by any reasonable standards of due process, this Plaintiff obtained a fair hearing and that adequate, nondis-

criminatory grounds existed for his termination pursuant to the terms of the contract, and that therefore, no claim existed pursuant to Section 1983 or 1985, which would serve as a basis for this action, and that therefore, the Order of the Court below should be affirmed.

POINT IV

THE RELIEF SOUGHT BY THE PLAINTIFFS IS NOT COGNIZABLE UNDER SECTIONS 1983 AND 1985 OF TITLE 42 AND IS BEYOND THE COURTS JURISDICTION PURSUANT TO THE 28 U.S.C. 1343

Paragraph "Third" of the Plaintiffs' Complaint alleges that Plaintiff Samuel Robinson and Plaintiff Faculty Association of Adirondack Community College, have brought this action pursuant to the provisions of the Civil Rights Act of 1871, Title 42 U.S.C. Section 1983 and 1985.

In his book entitled Federal Civil Rights Acts, Civil Practice, Chester J. Antieau states:

> "The purpose of this Section (1983) has been said to be to provide a civil action to protect persons against misuse of power possessed by virtue of state law and made possible because the defendant was clothed with the authority of the state."(at 49)

This statement was derived from a description of this Court in Davis v. Johnson (355 F 2nd 129) (1966). While it is clear that this area of law has expanded a great deal since 1966 and while every federal court has heard and determined many such cases, still this statement remains a good definition of the general purpose of the statute. Further, since this remedy is statutory, it is not infinite in its coverage and a Complaint filed under its provisions must set forth specific enough factual allegations to sustain a claim of violation.

Some Courts have gone so far as to hold that to state a cause of action, Plaintiff "must allege highly specific facts." [Weyandt v. Masons's Stores, Inc. (1968, D.C. Pa) 279 F. Supp. 283]"Mere conclusory allegations that unspecified constitutional rights have been infringed will not suffice." (Rodes v. Municipal Authority of Milford, 409 F2d 16, 17; cert den 396 US 861, 90 S.Ct. 133, 24 L Ed. 2d 114; reh den 396 US 950, 90 S. Ct. 377, 24 L Ed. 2d 256)

It is therefore imperative to review the pleadings themselves to determine whether the pleadings, a document drawn by the Plaintiff himself, when viewed in a light most favorable to the Plaintiff states some claim which is cognizable under the statute.

It is submitted that such an examination of the pleadings was made by the District Court and further, that a review of these pleadings by this Court will sustain Judge Foley's determination. First of all, as to the Plaintiff, Faculty Association, no cognizable claim of any sort is made. They held no property, nor were they deprived of anything nor is any allegation made that they were. Aside from any problem of standing to raise a claim which may exist, we believe it clear that there is no allegation of any claim existing and since no argument has even been raised by that Plaintiff to the contrary, we submit, nothing has been presented to this Court to warrant disturbing that result.

As to Mr. Robinson, the claim which is the only one purportedly

made by the Complaint is that hearing given him pursuant to his contract and pursuant to the Handbook rules which were a part of that contract, was a violation of his due process rights.

The question in this case then, becomes, does the federal Court have the power to "adjudicate" that the provisions of a contract violate due process, the relief sought by the Complaint (A-12). Appellants would have this Court become involved in deciding issues, which while they may well be important, are entirely academic when applied to this case. We submit that in order to take cognizance of this Complaint, this Court would have to declare that Federal Courts have the duty to interpret contracts, freely entered into, not breached, not vague, and to question and "adjudicate" that portions of that contract are constitutional or unconstitutional. We submit this is far beyond the scope of Sections 1983 and 1985 and not within the jurisdiction contemplated by the 28 U.S.C. 1343.

Further, it is in this context that Judge Foley decided the matter in the Court below. Whether or not Mr. Robinson had a property right is dependent on his expectancy--he could expect not to be terminated for exercising his free speech or freedom of religion--he should have also expected the contract provisions to be enforced. There is no claim that his free speech was interfered with and there is an admission that the contract provisions were carried out. Therefore, the Plaintiffs are arguing that Mr. Robinson is entitled

to rely on the part of the contract which contains the word, "continuing" and to have the balance of the contract which limits the same word declared unconstitutional. It is this situation we claim, which does not state a claim under either Section 1983 or Section 1985. Surely one cannot conspire to carry out the terms of a freely negotiated contract as required by Section 1985. Surely one does not misuse power by adhereing to a labor contract.

While the Courts have undoubtedly protected the rights of many persons by the application of the provisions of Section 1983 and Section 1985, we submit that its application here would amount to a clear statement that it was the proper role of the Federal Court to rewrite labor contracts that have been "mutually arrived at" between labor unions and public employers (A-43) ratified by all parties (A-43) and which have admittedly carried out. Judge Foley responded by saying that this Plaintiffs property rights were defined by his contract and that since he admits the contract was adhered to, he cannot claim to have been deprived of a property right. It is the role of the Federal Courts to safeguard freedom of speech and religion and to step in, when states attempt to violate these rights. Here, two parties freely decided that in the event a situation arises they will act in a certain way and when that situation arises, they followed the agreement and now one party seeks to use the Federal Courts to void the agreement. This, we submit, is not

only improper, but far beyond the scope of Section 1983 or Section 1985 and far beyond the jurisdiction enforced by Title 28 U.S.C. Section 1343. For these reasons, we submit the claims herein made are by definition, beyond the limits of the statutes under which they are commenced and therefore, by definition, fail to state a claim for which reason the lower Court's decision should be affirmed.

C O N C L U S I O N

WHEREFORE, Defendant seeks an Order Affirming the Order and Judgment of the District Court for the Northern District of New York, heretofore entered in this ma ... with costs to the Defendants-Appellees.

Respectfully submitted,

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cc: Jed B. Wolkenbrett, Esq.